HR Weekly Podcast
5/23/2007

Today is May 23, 2007, and welcome to the HR Weekly Podcast from the State Office of Human Resources. This week's topic concerns the revised federal rules which relate to the storage of electronic data.

Yesterday, OHR hosted a webinar entitled "E-Discovery & Document Retention: What Employers Need to Know" sponsored by M. Lee Smith Publishers. For those of you who were unable to attend, this webinar provided more details about the new rules as well as information about effective document retention and destruction policies.

Since amendments to the Federal Rules of Civil Procedure took effect on December 1, 2006, any legal proceeding from now on will require your agency to produce relevant electronic data quickly and efficiently. These legal proceedings can involve claims like ADA, discrimination, safety incidents, FMLA, progressive discipline, and sexual harassment as well as other potential claims.

For HR professionals and employees, perhaps the most important change is the requirement that parties who know or have reason to believe that litigation will commence must preserve all information, including electronic data, of possible relevance to the litigation. While not a radical change from existing law, the federal regulatory amendment adopts practices already followed by courts around the country.

This electronic data can include every email, spreadsheet, digital file of any kind. Plus, the request can include every PC; laptop; file and mail server; compact disc; small, portable memory device that plugs directly into a computer's USB port and is known as a memory stick or USB "flash" or "thumb" drive; external hard drive; and personal digital assistant or PDA...just to give some examples.

Most of the changes to the federal rules that apply to HR professionals relate to what must be produced in the discovery phase of litigation which is when the parties must disclose relevant information to their opponents. The responding party must know where all of its information, including electronic data, is located and what of the requested information is not "reasonably accessible because of undue burden or cost." If the responding party appears unwilling to disclose its information, the court could grant the requesting party's motion to search the responding party's computer system.

One provision of the revised federal rules that addresses the preservation of electronic data is known as the "safe harbor" provision. According to that provision, parties would not be subject to sanctions for compliance with an effective records and information retention policy that was in place before the party knew or reasonably should have known that litigation would begin. If you do not have a records and information retention policy, you should consider adopting one to help avoid legal sanctions.

HR professionals should also consult with their finance, information technology, and legal folks to determine what your agency needs to do to comply with the storage and preservation of electronic data under the revised federal rules. OHR is currently drafting a model policy for agencies to use and we will keep you updated on any further developments.

Thank you.